

Prejudgment and Post-Judgment Interest Are Cost of Defense, Not Part of Policy Limits

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A U.S. district court, in an unreported decision applying Pennsylvania law, held that an insurer was obligated to pay prejudgment and post-judgment interest even though it had already paid out its policy limit. *Livornese v. Med. Protective Co.*, CIV. A. No. 3124, 2003 WL 16184645 (E.D. Pa. Mar. 2003).

The insurer issued a medical malpractice insurance policy to two doctors and a medical practice with a limit of liability of \$400,000. The policy contained an endorsement providing that the insurer's "liability shall not exceed the stated amount for any one occurrence and subject to the same limitation for each occurrence, [the insured's] total liability during any one policy year shall not exceed the stated annual aggregate." The Pennsylvania Medical Professional Liability Catastrophe Loss Fund (CAT Fund) provided coverage in excess of \$400,000. A jury returned a medical malpractice judgment of \$2,058,000 against the doctors, and the court added \$713,923 in prejudgment interest. Substantial post-judgment interest also accrued. After the insurer paid \$400,000 into the court and argued that it had no further obligation, coverage litigation ensued.

The court held that the insurer was obligated to pay that portion of the prejudgment interest attributable to its \$400,000 in coverage. The court first noted that the endorsement made no reference to interest. It then pointed to a decision by the Pennsylvania Supreme Court, *Incollingo v. Ewing*, 379 A.2d 79 (Pa. 1977), to which the same insurer had been a party. In that case, the Pennsylvania Supreme Court had held that similar language was ambiguous, reasoning that the insurer was obligated to assume the full cost of a defense and "[t]he costs of a full defense may reasonably include interest, which is as much a cost of conducting a defense as court costs." The district court therefore concluded that policy was ambiguous and should be construed against the insurer.

The court also held that an insurer's liability could include post-judgment interest in excess of the policy limits. It reasoned that if it were to hold otherwise, insurers would have incentive to retain their money as long as possible so that they could earn interest. Applying the same reasoning, however, the court also held that the insurer was entitled to indemnity from the CAT Fund for post-judgment interest obligations incurred after the insurer paid the \$400,000 into the court and the CAT Fund "took exclusive control of the litigation."

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130